Kenya Union of Domestic, Hotels, Educational Institutions and Hospital Workers Union (KUDHEIHA) v Aga-Khan University Hospital Nairobi (Cause 51 of 2018) [2025] KEELRC 468 (KLR) (21 February 2025) (Judgment)

Neutral citation: [2025] KEELRC 468 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 51 OF 2018

B ONGAYA, J

FEBRUARY 21, 2025

BETWEEN

KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL INSTITUTIONS AND HOSPITAL WORKERS UNION (KUDHEIHA) .... CLAIMANT

AND

THE AGA-KHAN UNIVERSITY HOSPITAL NAIROBI .... RESPONDENT

JUDGMENT

1. The claimant filed the amended claim dated 22.01.2018 through J.A. Muli & Company Advocates. The claimants changed advocates to Nchoe Jaoko & Company Advocates. The claimant prayed for judgment against the respondent for:
    1. A declaration that the redundancy declared by the respondent in respect of 322 positions is unlawful, wrongful and unfair.
    2. An order compelling the respondent to unconditionally reinstate the 322 grievants to employment without loss of benefits and promotions from the date of redundancy to the date of reinstatement.
    3. An order compelling the respondent to pay the grievants all their emoluments from the date of termination to the date of reinstatement as per the tabulation annexed hereto.
    4. Twelve (12) months' compensation.
    5. Costs of this cause.
    6. Interest on (3), (4), and (5) hereinabove.
2. The claimant's case was as follows:

a. By virtue of a valid recognition agreement between the claimant and respondent, parties herein have concluded bargaining agreements periodically. The Collective Bargaining Agreement (CBA) currently in force was concluded on 29.08.2014.

b. The respondent employed the grievants herein on diverse dates and deployed them at its establishment situate at Nairobi.

c. On 14.05.2015, the respondent issued a notice of potential redundancies to all its employees on account of alleged re-organization. Consequently, the claimant union instituted ELRC Cause No. 815 of 2015 under certificate of urgency and motion application, challenging the said notice. At the ex-parte hearing, this Court restrained the respondent from proceeding with the redundancy process pending hearing and determination of the said application and suit. Pursuant to the Court Ruling delivered on 04.06.2015, the respondent was restrained from proceeding with the redundancy process pending hearing and determination of the suit therein. Further, the Court ruled that on the notice issued on 14.05.2015, time stopped running with the interim orders therein and such time would not run regarding the redundancy process or consultative meeting.

d. The respondent subsequently issued the claimant with another notice for redundancy dated 16.06.2015. However, the said notice and the notice dated 14.05.2015 were invalidated by this Honourable Court in the judgment delivered on 30.11.2015. The respondent lodged an appeal at the Court of Appeal and following a judgment delivered on 19.05.2017, the Court allowed the appeal and set aside all the consequential orders thereof. Nevertheless, all employees of the respondent continued with their employment as usual and the issue of redundancy was not raised for a period eight (8) months.

e. On 18.01.2018, the respondent's employees overheard a plan to declare them redundant. The employees who are members of the claimant union notified it and the union wrote to the respondent seeking clarity of the matter and requesting to be involved in the process. However, the respondent did not respond to the letter. In the evening of 18.01.2018, the respondent sent text messages to the grievants directing them to attend a meeting the next day on 19.01.2018. Upon arrival at the meeting, the respondent issued the grievants with termination notices on account of redundancy without any explanation, sheets indicating their respective terminal benefits and cheques, and certificates of service. The grievants were then directed to vacate the premises with immediate effect.

f. The respondent failed to comply with the peremptory legal provisions and the CBA between it and the claimant on redundancy. It did not issue a two months' notice to the claimant and or grievants for the redundancy effected on 19.01.2018 or at all. It further did not consult the claimant over the redundancies and the criterion for selection of the employees terminated on account of redundancy was neither communicated to the union nor the grievants herein. It also did not justify the reason for the redundancy and the report of the alleged assessment of operations, processes and cost structures was not given either to the claimant or its members.

g. The respondent miscalculated and understated the dues payable by it to the grievants. It failed to consider the period that affected employees serving in open-ended contracts worked pursuant to fixed-term contracts. It also understated payment in lieu of leave payable to the affected employees.

h. Further, the respondent discriminated against employees working for it pursuant to open-ended contracts by ignoring the period such employees were engaged under fixed-term contract and thereby put such employees to a disadvantage despite their long service.

i. In the official notice of redundancies resulting from alleged restructuring dated 19.01.2018, the respondent had indicated that the services of the employees rendered redundant would be outsourced. This is proof that the positions declared redundant were not superfluous or abolished and the respondent's action did not therefore meet the threshold set out in law pertaining to redundancy.

j. The redundancy declared by the respondent is therefore unlawful, wrongful and unfair and its actions were malicious and devoid of any financial reason. Consequently, this Court should quash the said redundancy.

3. The respondent's amended memorandum of reply dated 10.12.2018 was filed through Oraro & Company Advocates. The respondent's Advocates as at submissions stage had been changed to NBMA Advocates LLP. The respondent's case was as follows:

i. From the list of grievants in the claimant's amended memorandum of claim, five (5) of the grievants were neither employees of the respondent nor were on the respondent's payroll. The said grievants are: Davies James; Grace Kwamboka; James M. Ngugi; Jonathan Mwangi; and Peter M. Kimani.

ii. In addition, the said list of grievants has six (6) instances of duplication of the grievants, specifically: Akama Batroba (nos. 2 and 22); Grace Bonareri and Grace Moseti (nos. 111 and 116); Joshua Oyundi (nos. 184 and 185); Moureen Njeri (nos. 20 and 233); Salah Hanali (nos. 282 and 286); and Stephen Kimani (nos. 295 and 298).

iii. The respondent commenced review of its operations in 2014 and established that its costs base across board was very high and it was charging too much for access to its facilities, to the exclusion of a substantial segment of the local community. Consequently, it conducted a comprehensive and interactive assessment of all sectors of the organisation and recognised several areas in which considerable savings could be realised and be passed on to patients and other members of the community. It also established a problem with the headcount with duplicated roles, irrational and complicated organisation among other issues, all of which contributed to make the hospital's services expensive. There was therefore need to carry out a restructuring exercise that could result in redundancies.

iv. Accordingly, the respondent issued a two-month notice dated 14.05.2015 addressed to all its staff and copied and served on the claimant and the County Labour Office. It set forth in the notice the reasons for the restructuring and possibility of redundancy and invited the union and the employees to engage on consultations on the same. It also engaged various third-party service providers to establish the viability of outsourcing certain functions most of which were already partially outsourced. It however suspended the consultation process upon being served by the ex parte orders in ELRC Cause No. 815 of 2015.

v. The respondent withdrew the notice of 14.05.2015 in compliance with the first ruling of the Court delivered on 04.06.2015. It then issued three (3) notices of potential redundancies on 10.06.2015 addressed to the claimant's secretary general, the non-union staff and the County Labour Officer respectively. It held a staff forum on 11.06.2015 attended by its non-union members of staff who were encouraged to engage in the consultation exercise. When the

claimant sought to stay the notice dated 10.06.2015, the Court in its ruling on 16.07.2015 disallowed the application, paving way for the resumption of consultations.

vi. Unfortunately, the claimant ordered its officials and members not to participate in the consultation process on the possible redundancy. The respondent held its last consultation session with its non-union members of staff on 25.08.2015 and members of staff also sent in various suggestions and proposals up to and including 31.08.2015. It then began evaluating the results of the consultation process against the review it had earlier undertaken.

vii. When the first and second notices of redundancy were invalidated pursuant to a judgment delivered on 30.11.2015, the respondent filed an appeal, namely Civil Appeal No. 7 of 2016. The Court of Appeal allowed the appeal paving way for resumption of the suspended process. The exercise eventually concluded in December 2017 and a determination made that as part of the restructuring, it was necessary to let go of some staff in terms of the notices issued in May and June 2015. There was also need for the hospital to outsource non-core functions. Since the same was a wholesale elimination of entire departments, there was no selection criteria to be applied so as to identify individual employees within those eliminated departments who would be made redundant. Once the third-party service providers were ready to take over, all the affected employees were declared redundant and issued with redundancy letters on 19.01.2018.

viii. According to the respondent, it followed the processes laid down in the CBA and the *Employment Act*, 2007. It denied that it had a legal obligation to issue another notice. It also noted that computation of the final dues went beyond the requirements of section 40 of the *Employment Act* and clause 11 of the CBA, and it paid all the grievants their legally entitled terminal dues. The termination letters had further expressly directed for those with queries on the dues to contact the coordinator payroll.

ix. The respondent prayed that the claimant's prayers are denied and that the Court dismissed this claim as the claimant has failed to demonstrate that the termination of employment was wrongful and unfair.

4. Njoroge Mwangi (CW1) testified for the claimant while Valentine Situma Achungo (RW1), Dorothy Obiayo (RW2) and Bernard Wachira Muriithi (RW3) testified for the respondent.

5. Parties thereafter filed their respective submissions. The Court returns as follows:

a. There is no dispute that the respondent employed the members of the claimant being subject of the redundancy in issue and the respective contracts of service terminated by reason of redundancy.

b. The evidence is that the respondent abolished the departments in issue and opted for outsourcing. It was misconceived to be urged for the claimant that the outsourcing was evidence that the positions had continued to exist. The evidence is that the respondent opted to outsource workforce with respect to the outsourced services. Accordingly the Court finds that the respondent has established that indeed the reason for termination by redundancy was genuine as existing and was a fair reason as relating the respondent's operational requirements per sections 43 and 45 of the *Employment Act*, respectively.

c. The submission for the respondent is upheld that in view that entire departments were abolished and all employees were terminated, selection criteria based on seniority and suitability per section 40 of the Act was thereby unnecessary as mute and moribund.

d. As to validity of the notices the Court is bound by the respondent's case that the findings of the Court of Appeal are binding and final. As relates to consultations it appears to the Court that the claimant did not offer options to the respondent's business design of outsourcing and the respondent enjoyed the prerogative to so design its enterprise. The Court finds that the redundancy was fair in procedure and substance.

e. Accordingly the reliefs prayed for will fail as unjustified. It is not established that the redundancy was unfair or unlawful. The reliefs of reinstatement or compensation are not available as envisaged in section 49 of the Act. In any event the three years of limitation attached to grant of reinstatement per section 12 of the *Employment and Labour Relations Court Act* have since lapsed. The Court has considered that parties are in continuing recognition agreement and to foster good industrial harmony and social dialogue each will bear own costs.

In conclusion the suit is hereby dismissed with orders each party to bear own costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 21ST FEBRUARY, 2025.

BYRAM ONGAYA

PRINCIPAL JUDGE